

THIRUCHELVASEGARAM MANICKAVASEGAR

a

v.

MAHADEVI NADCHATIRAM

COURT OF APPEAL, KUALA LUMPUR

b

SITI NORMA YAAKOB JCA

ABU MANSOR ALI JCA

HAIDAR MOHD NOOR JCA

[CIVIL APPEAL NO: W-02-621-97]

18 AUGUST 1998

c

CIVIL PROCEDURE: *Time - Extension of time - Further and better particulars - Discretion of court - Whether court has jurisdiction to extend time after affirming order to file particulars within prescribed time - Striking out particulars filed out of time - Waiver and estoppel - Rules of the High Court 1980, O. 3 r. 5*

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Pursuant to a defamation action instituted by the plaintiff against the defendant, the former filed an application dated 29 April 1997 and obtained an order from the deputy registrar on 18 June 1997, ordering the defendant to file and serve on the plaintiff further and better particulars of the defendant's amended counterclaim on or before 18 July 1997, failing which certain parts of the amended counterclaim would be struck out. The defendant filed an appeal against the whole decision of the deputy registrar. On 14 August 1997 the JC affirmed the order of the deputy registrar in respect of the particulars.

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On 15 September 1997, the defendant served upon the plaintiff the English version of the particulars. On the same day, the plaintiff's solicitors wrote a letter to the defendant's solicitors notifying them that particulars served on 15 September 1997 were null and void as the particulars were not filed within the prescribed time as ordered by the deputy registrar and which was confirmed by the JC.

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On 16 September 1997, the defendant filed and served the Bahasa Malaysia version of the particulars. The plaintiff protested at the steps taken by the defendant in tendering the particulars on the grounds that: (i) there was no necessity to make a fresh application as the JC did not grant any extension of time to the defendant to file the particulars; and (ii) the defendant had failed to comply with the order of the deputy registrar. The plaintiff subsequently filed encl. 69 to strike out the particulars while the defendant filed encl. 73 for an extension of time to file the particulars. Enclosure 69 was dismissed while encl. 73 was allowed.

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a Among the issues for consideration were: (i) whether the JC had the jurisdiction to allow encl. 73 to extend time to supply the particulars bearing in mind that he had affirmed the order of the deputy registrar on 14 August 1997; and (ii) if he did have the jurisdiction, whether the JC had correctly exercised his discretion.

b **Held:**
Per Haidar Mohd Noor JCA

c [1] By virtue of O. 3 r. 5(1) of the Rules of the High Court, the court has the discretion to extend time and this power may be exercised even if the application is made after the expiry period. In the circumstances, it would seem that the learned JC had the jurisdiction to extend time by a further order.

d [2] However, the JC erred in the exercise of his discretion as he failed to consider all the material facts before him – particularly that the defendant had intentionally disobeyed that part of the order for the particulars to be served and filed within a prescribed time and that after realising the serious consequences of the plaintiff's application, she had no choice but to file her application for an extension of time.

e [3] The JC had also erred in relying on the issue of waiver or estoppel in granting the defendant's application. Estoppel in the context of litigation arises only when a party to an action has at least two alternative and mutually exclusive courses open to him. If by words or conduct he elects to pursue one of them and thereby leads his opponent to believe that he has absconded the other, he may if the circumstances so warrant, be precluded from later changing course. In this case, the plaintiff took the initiative by encl. 69 to strike out the particulars with the consequential result as per the order of the deputy registrar that the relevant paragraphs of the amended counterclaim be struck out.

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g *[Plaintiff's appeal allowed.]*

[Bahasa Malaysia Translation Of Headnotes]

h Berikutan suatu tindakan fitnah yang dimulakan oleh plaintiff terhadap defendan, plaintiff telah memfailkan suatu permohonan bertarikh 29 April 1997 dan telah memperolehi suatu perintah dari timbalan pendaftar pada 18 Jun 1997, yang telah memerintahkan defendan supaya memfailkan dan menyerahkan ke atas plaintiff butir-butir yang lebih lanjut dan terperinci kepada tuntutan balas defendan pada ataupun sebelum 18 Julai 1997, di mana jikalau defendan gagal berbuat begitu maka bahagian-bahagian tertentu tuntutan balas tersebut akan dibatalkan. Defendan juga dikehendaki membayar kos permohonan tersebut.

i

Defendan telah memfailkan rayuan terhadap keseluruhan keputusan timbalan pendaftar. Pada 14 Ogos 1997, Pesuruhjaya Kehakiman telah mengesahkan perintah timbalan pendaftar. *a*

Pada 15 September 1997, peguamcara defendan telah menyerahkan ke atas peguamcara plantif versi bahasa Inggeris butir-butir tersebut. Pada hari yang sama peguamcara plantif telah menulis surat kepada peguamcara defendan yang memaklumkan mereka bahawa butir-butir yang diserahkan pada 15 September 1997 adalah tidak sah dan terbatal kerana butir-butir tersebut telah tidak difailkan dalam tempoh masa yang diperintahkan oleh timbalan pendaftar dan yang telah disahkan oleh Pesuruhjaya Kehakiman. *b*

Pada 16 September 1997, peguamcara defendan telah memfailkan dan menyerahkan versi Bahasa Malaysia butir-butir tersebut. Plaintiff telah membantah terhadap langkah-langkah yang diambil oleh defendan dalam mengemukakan butir-butir tersebut atas alasan bahawa: (i) tidak ada perlunya membuat permohonan yang baru seperti yang dikatakan oleh defendan kerana Pesuruhjaya Kehakiman telah tidak memberi sebarang perlanjutan masa supaya defendan dapat memfailkan butir-butir tersebut; dan (ii) bahawa defendan telah gagal mematuhi perintah timbalan pendaftar. Plaintiff kemudiannya telah memfailkan lampiran 69 untuk membatalkan butir-butir tersebut sementara defendan telah memfailkan lampiran 73 untuk memohon perlanjutan masa untuk memfailkan butir-butir tersebut. Lampiran 69 telah ditolak sementara lampiran 73 dibenarkan. *c*

Antara isu-isu untuk dipertimbangkan adalah (i) samada Pesuruhjaya Kehakiman mempunyai bidangkuasa untuk membenarkan lampiran 73 untuk melanjutkan masa untuk mengemukakan butir-butir memandangkan bahawa dia telahpun mengesahkan perintah timbalan pendaftar pada 14 Ogos 1997; dan (ii) jikalau dia mempunyai bidangkuasa, samada dia telah melaksanakan budibicara tersebut dengan wajar. *d*

Diputuskan:
Oleh Haidar Mohd Noor HMR *e*

[1] Berdasarkan A. 3 k. 5(1) Kaedah-kaedah Mahkamah Tinggi 1980, mahkamah mempunyai budibicara untuk melanjutkan masa dan kuasa ini boleh dilaksanakan walaupun permohonan tersebut dibuat setelah tamatnya tempoh masa. Dalam keadaan ini, nampaknya Pesuruhjaya Kehakiman telah mempunyai bidangkuasa untuk melanjutkan masa dengan perintah selanjutnya. *f*

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- a** [2] Walau bagaimanapun, pesuruhjaya kehakiman telah silap dalam melaksanakan budibicaranya kerana dia telah gagal mempertimbangkan semua fakta-fakta material di hadapannya – terutamanya fakta bahawa defendan telah dengan sengaja dan berniat tidak mematuhi bahagian perintah tersebut yang memerintahkan supaya butir-butir diserahkan dan difailkan dalam tempoh masa dan bahawa setelah sedar akan implikasi serius permohonan plaintif, dia telah tidak mempunyai pilihan lain selain dari membuat permohonan untuk perlanjutan masa.
- b**
- c** [3] Hakim juga telah silap kerana telah bergantung kepada isu penepian ataupun estoppel dalam membenarkan permohonan defendan. Estoppel dalam konteks litigasi timbul hanya apabila pihak kepada tindakan tersebut mempunyai sekurang-kurangnya dua cara yang alternatif dan eksklusif yang terbuka kepadanya. Jikalau dengan perkataan ataupun tindakan dia memilih satu daripadanya dan ini menyebabkan pihak yang lain percaya bahawa dia telah mengabaikan cara yang satu lagi, maka
- d** jika keadaan membenarkan, dia boleh dihalang menukar caranya. Dalam kes ini, plaintif telah mengambil langkah untuk membatalkan butir-butir dengan lampiran 69 iaitu selaras dengan perintah timbalan pendaftar bahawa perenggan-perenggan yang relevan tuntutan balas itu dibatalkan.
- e** [Rayuan plaintif dibenarkan.]
- f** **Cases referred to:**
Government of Malaysia v. Dato' Chong Kok Lim [1973] 2 MLJ 74 (refd)
Hadkinson v. Hadkinson [1952] 2 All ER 567 (refd)
Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd [1997] 2 CLJ 104 (refd)
Hock Hua Bank Bhd v. Sahari Murid [1981] 1 MLJ 143 (refd)
Hytec Information Systems Ltd v. Coventry City Council [1997] 1 WLR 1666 (refd)
Kumpulan Sua Betong Sdn Bhd v. Dataran Segar Sdn Bhd [1992] 1 CLJ 20 (refd)
Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor [1997] 3 CLJ 305 (foll)
Pembinaan KSY Sdn Bhd v. Lian Seng Properties Sdn Bhd [1991] 1 CLJ 263 (refd)
Pertubohan Berita Nasional Malaysia v. Stephen Kalong Ningkan [1982] 1 CLJ 471 (foll)
- g** *Public Bank Bhd v. Nikseng Development Sdn Bhd* [1996] 3 CLJ 448 (refd)
Re Jokai Tea Holdings Ltd [1993] 1 All ER 630 (refd)
Samuels v. Linzi Dresses Ltd [1981] 1 QB 115 (refd)
TO Thomas v. Asia Fishing Industry Pte Ltd [1977] 1 MLJ 151 (refd)
- h** **Legislation referred to:**
 Rules of the High Court 1980, O. 3 r. 5(1), (2), O. 56 r. 1(4)
 For the plaintiff - Malik Imtiaz Sarwar; M/s Sykt M Segaram
 For the defendant - Saraswathy Devi (Devi Sodhi & Mahadevi Nadchatiram with her);
 M/s Mahadevi Nadchatiram & Partners
- i** [Appeal from High Court, Kuala Lumpur; Civil Suit No: S2-23-04-97]
 Reported by Mariette Peters-Goh

JUDGMENT

Haidar Mohd Noor JCA:

The appellant (plaintiff) appealed against the orders given on 17 October 1997 by the learned Judicial Commissioner ('JC') (as he then was) in respect of summons-in-chambers dated 20 September 1997 (encl. 69) and summons-in-chambers dated 8 October 1997 (encl. 73) (see p. 19 of the appeal record). Both summonses-in-chambers relate to the suit filed by the appellant against the respondent (defendant). The suit is a defamation action and it arose out of a dispute in respect of the vast estate left behind by the respondent's father. In that ensuing dispute allegations have been made by the respondent against the appellant which the latter considers to be defamatory of him.

Both parties are advocates and solicitors of the High Court, Malaya. They are related. The appellant is the brother-in-law of the respondent, that is, his wife is the sister of the respondent.

Before considering encls. 69 and 73 it would be appropriate to set out the background facts leading to the filing of the two summonses-in-chambers.

For ease of reference, hereinafter the appellant is referred to as the plaintiff and the respondent as the defendant.

Background

Pursuant to the plaintiff's summons-in-chambers dated 29 April 1997, the deputy registrar, on 18 June 1997 made an order ordering, *inter alia*, the defendant to file and serve on the plaintiff further and better particulars ('particulars') of the defendant's amended counterclaim dated 19 April 1997, on or before 18 July 1997, failing which, paras (2), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12), (13), (14), (15), (16), (17), (18), (20) and (21) of the amended counterclaim be struck out. (See pp. 137 to 141 of the appeal record). The defendant was also ordered to pay the costs of the application.

On 21 June 1997, the defendant filed an appeal to the judge-in-chambers against the whole decision of the deputy registrar given on 18 June 1997. (encl. 39). (See pp. 142 - 147 of the appeal record).

It is not disputed that the defendant did not obtain a stay of the order of the deputy registrar.

On 7 July 1997, the appeal came for hearing before the learned JC but was adjourned to 8 July 1997.

- a* On 8 July 1997, the learned JC ordered:
- (a) the parties to put in written submissions; and
 - (b) fixed the date of decision on 14 August 1997.
- b* On 14 August 1997, the learned JC gave his decision orally. His written judgment was delivered on 17 December 1997, (pp. 21 to 26 of the appeal record). The learned JC made the following orders:
- (i) affirmed the order of the deputy registrar dated 18 June 1997 in respect of the particulars and the time prescribed therein (para. 3 of the order);
- c* and
- (ii) allowed the defendant's appeal in respect of the other orders made by the deputy registrar (para. 1 relating to the striking out of paras. (9), (10), (12), (15) and (16) with the exception of para. (11) of the amended statement of defence dated 19 April 1997 and para. 2 relating to the striking out of paras. (22), (23), (24), (25) and (26) of the amended counterclaim dated 19 April 1997). (See the order at pp. 135 to 136 of the appeal record).
- d*
- There was no order in respect of costs of the appeal.
- e*
- There has been no appeal against the order of the learned JC by either party.
- The plaintiff's solicitors *vide* letter dated 14 August 1997, sent to the defendant's solicitors a copy of the draft order dated 14 August 1997 for approval, the receipt whereof was duly acknowledged by the defendant's solicitors on the said letter itself. (See p. 295 of the appeal record). No evidence was shown by the defendant that she did not agree with the draft order. As a result the draft order was accordingly perfected as reflected at pp. 135 to 136 of the appeal record.
- f*
- Next, the defendant's solicitors on 15 September 1997, took upon themselves to serve on the plaintiff's solicitors the English language version of the particulars. On the same day the plaintiff's solicitors wrote a letter to the defendant's solicitors notifying them that the particulars served on 15 September 1997 were null and void as the particulars were not filed within the prescribed time as ordered by the deputy registrar and confirmed by the learned JC. (See p. 300 of the appeal record).
- g*
- h*
- On 16 September 1997, the defendant's solicitors filed in court and served on the plaintiff's solicitors the Bahasa Malaysia version of the particulars. (See pp. 148 to 155 of the appeal record). It was purportedly made pursuant to the order of the learned JC of 14 August 1997.
- i*

Quite naturally, the plaintiff through his solicitors' letter dated 16 September 1997 (p. 304 of the appeal record) vehemently protested to the steps taken by the defendant in the tendering of the particulars. From the said letter, the plaintiff contended:

- (a) there was no necessity for him to apply for a fresh application as intimated by the defendant as the learned JC did not give any extension of time to the defendant to file the particulars; and
- (b) the defendant failed to comply with the order of the deputy registrar duly affirmed by the learned JC.

In that event the plaintiff maintained that the particulars were null and void and the acceptance of the service of the particulars should not be treated as a waiver on his part.

On 20 September 1997, the plaintiff filed the summons-in-chambers (encl. 69) to strike out the particulars.

On 8 October 1997, the defendant filed the summons-in-chambers (encl. 73) for an extension of time to file the particulars.

On 17 October 1997, the learned JC dismissed encl. 69 and allowed encl. 73. The learned JC allowed the plaintiff his costs in respect of encls. 69 and 73 though in his written judgment later he stated that on further reflection he ought to have ordered costs be in the cause. Hence the appeal by the plaintiff to this court.

Issues

- (a) Whether the learned JC had the jurisdiction to allow the application of the defendant (encl. 73) to extend the time to supply the particulars bearing in mind that he had affirmed the order of the deputy registrar on 14 August 1997.
- (b) If he had the jurisdiction, whether the learned JC had correctly exercised his discretion.

We observed that the problem arose in this way:

- (i) On 21 June 1997, the defendant filed an appeal to the judge-in-chambers against the whole of the decision of the deputy registrar given on 18 June 1997.
- (ii) The defendant did not obtain a stay of the order of the deputy registrar.
- (iii) On 7 July 1998, the appeal before the learned JC came up for hearing but was adjourned to 8 July 1997.

- a* (iv) On 8 July 1997, the learned JC ordered:
- (a) the parties to put in written submissions; and
 - (b) fixed the date for decision on 14 August 1997.
- b* (v) On 14 August 1997, the learned JC gave an oral decision. His decision (pp. 292 - 293 of the appeal record) was:
- Prayer (1) allowed except para. 11 to be struck out.
 - Prayer (2) allowed.
- c* Prayer (3) disallowed.
- Prayer (4) each party to pay its own costs.
- Fixed 20 August, 1987 for case management.
- d* From the sequence of events set out above, it is clear that by the time the learned JC gave his decision on 14 August 1997, affirming that part of the order of the deputy registrar in respect of the particulars (prayer 3), the time prescribed by the deputy registrar had lapsed. He knew or ought to have known of this fact. If he was minded to extend the time, he could certainly have done so. In any event even if the learned JC had overlooked this fact as to
- e* the time prescribed, it was a matter for the defendant to bring to his attention of such fact and if need be to apply orally to him to extend the time. It would then be a matter for him to exercise his discretion to extend time or refuse an extension.
- f* There was a bit of confusion as to whether the defendant applied orally for extension of time at the appeal stage.
- However, the learned JC at p. 4 of his judgment (p. 24 of the appeal record) stated:
- g* My recorded notes do not show that an application was made by the defendant to extend time and that I dismissed the same.
- The learned JC, whilst agreeing that that part of the order of the deputy registrar ought to have been complied with or an application for stay filed by the defendant, then went on to say “any compliance of the order of the deputy
- h* registrar whilst the matter is under appeal, would have rendered nugatory the subsequent appeal”. We consider this statement to be incorrect.
- Firstly, an appeal does not automatically operate as a stay of the proceedings in which the appeal is brought and this is clear from O. 56 r. 1(4) of the
- i* Rules of the High Court 1980 except so far as the court may otherwise direct.

Secondly, in order that the appeal is not rendered nugatory, it is for the defendant to apply to the deputy registrar for an order of stay pending appeal to the judge-in-chambers. In the event of failure to obtain the stay order before the deputy registrar, it is then open to the defendant to apply to the judge-in-chambers for a stay order. *a*

On both counts, the defendant failed to apply for a stay order. *b*

The law is clear on the steps to be taken to prevent an appeal from being rendered nugatory.

In the circumstances the learned JC, having regard to the facts before him, erred in stating that compliance of the deputy registrar's order would have rendered the subsequent appeal nugatory. *c*

The learned JC went one step further by stating that if the plaintiff felt strongly on this issue, the plaintiff should, as soon as the 30-day period was over, that is, after 18 July 1997, apply to strike out the appeal. According to the learned JC, the plaintiff by appearing before him and arguing the matter, he had waived any right to file encl. 69 and he was estopped by his own conduct. *d*

It should be noted that the appeal was not confined to that part of the order by the deputy registrar on particulars only but also against the striking off of part of the amended defence and the amended counterclaim. (See pp. 117 - 147 of the appeal record). *e*

Further, at the time when the appeal first came for hearing before the learned JC on 7 July 1997 and adjourned to 8 July 1997, the time imposed by the deputy registrar, that is, on or before 18 July 1997 had not lapsed yet. In that event, how could it be right or possible for the plaintiff to apply to strike out the appeal as intimated by the learned JC. At that point of time the appeal was properly before the learned JC. *f*

However, instead of hearing and arriving at a decision on 8 July 1997, the learned JC decided to adjourn the appeal again to 14 August 1997 and ordered the parties to put in written submissions for him to give a decision on the said date. Quite naturally, it would be too late in the day and in any event beyond the plaintiff's control to file an application to strike out the appeal as intimated by the learned JC as 14 August 1997 had already been fixed for his decision. *g*

Clearly therefore the learned JC was wrong and misdirected himself on this issue. *h*

i

a **Waiver Or Estoppel On The Part Of The Plaintiff**

b The order of the deputy registrar was in precise terms and that order was affirmed by the learned JC on 14 August 1997. The particulars had been served outside the time limit prescribed by the order and there has clearly been default by the defendant. The inescapable conclusion would be that those paragraphs as stipulated in para. 3 of the order of the deputy registrar relating to the amended counterclaim of the defendant became automatically struck out. (See *Pertubohan Berita Nasional Malaysia v. Stephen Kalong Ningkan* [1982] 1 CLJ 471; [1982] 2 MLJ 13).

c The Federal Court in *Pertubohan Berita Nasional Malaysia v. Stephen Kalong Ningkan*, *supra*, stated that there cannot be a waiver of the order of the court and at p. 15 said:

d In this connection, it should be observed that the time limit for service was fixed by a court order, and **it seems hardly competent for the appellant to waive compliance with a court order: the proper means to excuse non-compliance is by way of a further court order.** This order the respondent sought – but not until months later, in August 1979. He could have made his application for such an Order before the hearing of the appellant’s summons-in-chambers, but he did not do so. When queried as to the delay, learned counsel for the respondent stated that it was a mistake for the respondent not to have applied for the extension earlier – a hardly – convincing reply!

e (emphasis provided)

f On the estoppel issue, it should be noted that estoppel in the context of litigation arises only when a party to an action has at least two alternative and mutually exclusive courses open to him. If by words or conduct he elects to pursue one of them and thereby leads his opponent to believe that he has abandoned the other, he may, if the circumstances so warrant, be precluded from later changing course (see *Lai Yoke Ngan (p) & Anor. v. Chin Teck Kwee @ Chin Teck Kwi & Anor* [1997] 3 AMR 2458 at p. 2474). In this case, the plaintiff took the initiative by encl. 69 to strike out the particulars with the consequential result as per the order of the deputy registrar that the relevant paragraphs of the amended counterclaim be struck out.

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In the circumstances, the learned JC was wrong to rely on the issue of waiver or estoppel in granting the defendant’s application (encl. 73)

h **Jurisdiction**

i It was the contention of counsel for the plaintiff that as the learned JC did not on 14 August 1997 extend the time for the defendant to file the particulars and having affirmed the order of the deputy registrar, the matter has become *res judicata* and the court has no jurisdiction to consider the defendant’s application (encl. 73) for an extension of time. Counsel for the plaintiff cited the decision of this court in *Hartecon JV Sdn. Bhd. & Anor v. Hartela*

Contractors Ltd. [1997] 2 CLJ 104; [1996] 2 MLJ 57 in support thereof. In that case, the judgment of Sharma J in *Government of Malaysia v. Dato' Chong Kok Lim* [1973] 2 MLJ 74, was cited with approval and at p. 66 of the report, the following was stated. a

We cannot overemphasize the proposition that once a judge makes a ruling, substantive or procedural, final or interlocutory, it must be adhered to and may not be re-opened willy-nilly. One may then ask: how is this approach to be reconciled with the decision in *Harrison*? The answer to that question lies in recognising that the principle for which that case is authority applies only where it is demonstrated that the court plainly lacked jurisdiction to make the order complained of: provided, of course, that the order in question has not been drawn up and perfected. To extend the scope of that principle would be to effectively demolish the requirements of certainty and finality which are the two pillars on which the judicial process rests. b
c

The order of the learned JC dated 14 August 1997 had been drawn up and perfected and following the contention of counsel for the plaintiff, the learned JC has no power to extend the time as per the defendant's application (encl. 73). This he surmised would tantamount to altering, varying or setting aside (unless under the slip rule) of his earlier order. (See *Hock Hua Bank Bhd. v. Sahari bin Murid* [1981] 1 MLJ 143). d

The defendant's only remedy, continued the counsel for the plaintiff, was to appeal against the order of the learned JC given on 14 August 1997 when he did not grant the extension of time when affirming the order of the deputy registrar. The defendant did not appeal but instead chose to file an application (encl. 73) for an extension of time. e

We would agree with the submission of counsel for the plaintiff only if the defendant applied to set aside the order of the learned JC affirming the order of the deputy registrar as to particulars as well. What the defendant did in her application (encl. 73) was merely to ask for an extension of time to file the particulars. In this respect, the Federal Court in *Pertubohan Berita Nasional Malaysia, supra*, in observing the time limit for service fixed by a court order (as in this case), stated at p. 15: f
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the proper means to excuse non-compliance is by way of further order.

We agreed with counsel for the defendant that the court has a discretion to extend time as provided by O. 3 r. 5(1) of the Rules of the High Court 1980. Under O. 3 r. 5(2), this power may be exercised even if the application is made after the expiry of the period. h

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a Order 3 r. 5 reads:

(1) The court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorized by the rules or by any judgment, order or direction, to do any act in any proceedings.

b (2) The court may extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period.

c In the circumstances, it would seem that the learned JC had the jurisdiction to extend by a further order the time prescribed by the deputy registrar in his order dated 18 June 1997.

Discretionary Power To Extend Time

d Ideally, all prescribed time limits falling under statute or made by court orders should be complied with and not to be ignored. (See *Samuels v. Linzi Dresses Ltd.* [1981] 1 QB 115, at p. 126).

In the exercise of his discretion to extend time, the learned JC had this to say at p. 5 of his judgment (p. 25 of the appeal record):

e I therefore was of the opinion that because of the close relationship between the respective protagonists every opportunity must be given to either party to ventilate fully their grievances; for where else can either party go for justice than the footsteps of this court.

f There may well be grievances between the parties and that every opportunity must be given to ventilate their grievances especially in view of their close relationship but then was this a valid ground for the learned JC to exercise his judicial discretion? If the learned JC was right on this ground, it would invariably mean that in all such cases there will be automatic extension irrespective of the grounds for non-compliance however heinous the conduct may be. In that event orders of court as to time would be rendered futile. It is for this reason that acrimonious disputes between the litigants would definitely call for extra caution and strict observance of all orders as to time.

g In this respect we can do no better than to quote the view of Ward LJ in *Hytec Information Systems Ltd. v. Coventry City Council* [1997] 1 WLR 1666 at p. 1875:

h The basis of the rule is that orders of the court must be observed and the court is entitled to expect its officers and counsel who appear before it are more observant of that duty even than the litigant himself.

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It would then be for the defendant to explain or give reasons for her disobedience to the order of the court before the court could exercise its discretion. Sir Nicholas Browne – Wilkin, V-C, in *Re Jokai Tea Holdings Ltd.* [1993] 1 All ER 630, at p. 637 of the report has also expressed his views: a

In my judgment, in cases in which the court has to decide what are the consequences of a failure to comply with an order, unless the relevant question is whether such failure is intentional and contumelious. The court should not be astute to find excuses for such failure since obedience to orders of the court is the foundation on which its authority is founded. But if a party can clearly demonstrate that there was no intention to ignore or flout the order and that the failure to obey was due to such extraneous circumstances, such failure to obey is not to be treated as contumelious and therefore does not disentitle the litigant to rights which he would otherwise have enjoyed. b
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In this case, the ground of ventilation of grievances can hardly be said to be due to extraneous circumstances.

The learned JC did not consider whether the failure to obey the order was intentional or contumelious and since the numerous authorities were of one mind that such conduct should be considered, in our view, the learned JC erred when he failed to consider the defendant’s conduct in refusing to obey the order. d

It is apparent from the appeal record that the disobedience of the order was grounded on the fact that the defendant, when confronted with the plaintiff’s protest against service of the particulars on 15 September 1997, claimed that there was no need for her to comply with the order. She took the stand that the order of the deputy registrar and subsequently the order of the learned JC were a nullity and suggested that the plaintiff make a fresh application for the particulars instead. (See p. 302 of the appeal record). This is so as the plaintiff had since reamended his statement of claim and the defendant had also reamended her statement of defence and counterclaim. As the particulars ordered to be filed were in respect of the amended counterclaim and since that particular pleading has been reamended, the order for particulars had become redundant. e
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This contention cannot be correct as the particulars ordered to be filed were in respect of the defendant’s amended counterclaim filed on 19 April 1997. The amendments made by the plaintiff were restricted to his statement of claim. The defendant’s counterclaim was wholly untouched and never amended. h

In any event a party cannot ignore or refuse to comply with an order of court on the ground of nullity. The Federal Court in *T.O. Thomas v. Asia Fishing Industry Pte. Ltd.* [1977] 1 MLJ 151, had this to say on the matter at p. 159 of the report: i

- a** An order even irregularly obtained cannot be treated as a nullity but must be implicitly obeyed, until by proper application it is discharged. This view is supported by authority. In dealing with the contention that the original order had been erroneously granted in *Fennings v. Humphrey* [1841] 4 Beav 1; 49 Ed. 237 where Lord Langdale MR said:
- b** ...
- He is not to determine for himself, but ought to come to the court for relief, if advised that the order is invalid.
- c** That same sentiment was expressed by the then Supreme Court in *Pembinaan KSY Sdn. Bhd. v. Lian Seng Properties Sdn. Bhd.* [1991] 1 MLJ 100 where at p. 102 of the report, it quoted with approval the following passage in the judgment of Romer LJ in *Hadkinson v. Hadkinson* [1952] 2 All ER 567:
- d** It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged.
- In the circumstances it would be wrong for the defendant to determine for herself that the order was a nullity and she need not comply with it.
- e** The fallacy of the stand taken by her on the order of the court is shown by her taking the step of filing the application (encl. 73) for an extension of time to comply with the very same order that she considers to be a nullity. This would surely reflect her intention to initially flout the peremptory order.
- f** There is also the defendant's contention that she believes she was given an extension of time up to 15 September 1997 by the order of the learned JC dated 14 August 1997 to file and serve the particulars.
- The notes of the proceedings, the judgment of the learned JC and the order that was drawn up and perfected could not support her belief. She then readily admitted that she was mistaken.
- g** To put it in a nutshell, she intentionally and deliberately disobeyed that part of the order for the particulars to be served and filed within a prescribed time and after realising the serious consequences of the plaintiff's application (encl. 69), she had no choice but to file her application (encl. 73) for an extension of time.
- h**
- i** Counsel for the defendant submitted that the effect of the plaintiff's application (encl. 69) would be prejudicial to her as certain paragraphs of her amended counterclaim would be automatically struck out. This is a non-issue as prejudice itself is not a ground for the learned JC to consider when exercising his discretion to extend time. This is so as we have shown from the many

authorities cited that the primary consideration is whether the party can clearly demonstrate that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances. *a*

Ventilation of the grievances as found by the learned JC can hardly be an acceptable ground for him to exercise his discretion in favour of the defendant for the reasons stated earlier. Neither had it been shown by the defendant on the factual situation that the failure to obey the order was due to extraneous circumstances. *b*

In the circumstances, we consider that the learned JC erred in exercising his discretion as he failed to properly consider all the material facts before him and applied the wrong test. *c*

Though an appellate court should be slow to interfere with the exercise of the discretionary power of the court below, for the reasons appearing in this judgment, there are compelling grounds for us to so interfere. (See *Kumpulan Sua Betong Sdn Bhd v. Dataran Segar Sdn. Bhd.* [1992] 1 CLJ 20; [1992] 1 MLJ 263 and *Public Bank Bhd v. Nikseng Development Sdn. Bhd.* [1996] 3 CLJ 448; [1997] 3 MLJ 101). *d*

For the reasons that we have given, we had allowed this appeal with costs, set aside the order of the High Court and ordered the deposit to be refunded to the plaintiff. *e*

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*a**b*

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*c**d**e**f**g**h**i*